

**FEDERAL ELECTION COMMISSION**  
**999 E Street, NW**  
**Washington, DC 20463**

**FIRST GENERAL COUNSEL'S REPORT**

**MUR 6268**

**DATE RECEIVED: April 1, 2010**

**DATE ACTIVATED: June 15, 2010**

**EARLIEST SOL: March 21, 2015**

**LATEST SOL: March 25, 2015**

**COMPLAINANT:**

**Steve Gillespie**

**RESPONDENTS:**

**Congressman Alan Grayson**  
**Committee to Elect Alan Grayson and**  
**Paul Ashcraft, in his official capacity as treasurer**

**RELEVANT STATUTES:**

**2 U.S.C. § 441i(e)**  
**11 C.F.R. § 300.2(m)**  
**11 C.F.R. § 300.62**  
**11 C.F.R. § 300.64**

**INTERNAL REPORTS CHECKED:**

**Disclosure Reports**

**FEDERAL AGENCIES CHECKED:**

**None**

**I. INTRODUCTION**

The complaint alleges that Congressman Alan Grayson and his principal campaign committee, the Committee to Elect Alan Grayson and Paul Ashcraft, in his official capacity as treasurer, ("Committee") improperly solicited corporate contributions on behalf of a non-federal candidate, by emailing an invitation to a non-federal fundraising event that suggested recipients make contributions of up to \$500 per person or "corporate entity." Respondents assert that a campaign volunteer caused a Committee vendor to distribute the invitation to a subscriber list without complying with Congressman Grayson's instructions that the volunteer ascertain whether a disclaimer was required and to return the invitation to the Congressman for his final

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1 approval it before it was distributed.<sup>1</sup> Under these circumstances, Respondents assert that they  
2 may not be held responsible for violating the law then in effect. They also maintain that any  
3 attempt to hold them responsible, "given the confused state of the law" prior to the  
4 Commission's recent rulemaking concerning federal officeholder's participation at non-federal  
5 fundraising events, would raise constitutional concerns. Response at 6.

6 Although this matter raises questions about compliance with 2 U.S.C. § 441i(e), given the  
7 intervening changes in the corresponding regulations, and the circumstances regarding approval  
8 of the invitation, we do not believe it is a worthwhile use of the Commission's limited resources  
9 to pursue this matter. Therefore, we recommend the Commission dismiss the complaint's  
10 allegations that Congressman Alan Grayson and the Committee to Elect Alan Grayson and Paul  
11 Ashcraft, in his official capacity as treasurer, violated 2 U.S.C. § 441i(e).

## 12 **II. FACTUAL AND LEGAL ANALYSIS**

### 13 **A. Factual Background**

14 Alan Grayson was first elected in 2008 to the U.S. House of Representatives from  
15 Florida's 8th Congressional District and is a candidate for reelection. On March 21, 2010, the  
16 Committee sent an e-mail from the address [alanguyson@graysonforcongress.com](mailto:alanguyson@graysonforcongress.com) to an  
17 unknown number of persons on a distribution list, inviting them to a March 25, 2010 fundraising  
18 reception benefitting Scott Maddox, a candidate for Florida Commissioner of Agriculture &  
19 Consumer Services. See Attachment 1. The e-mail invited recipients to "Please Join  
20 Congressman Alan Grayson" at the reception, but also noted that he might not be in attendance if  
21 there were votes scheduled in the U.S. House of Representatives that day. Complaint at 3. The  
22 invitation suggested a \$500 contribution, noting that "[c]ontributions are limited to \$500 per

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<sup>1</sup> The response was initially submitted only on behalf of Congressman Grayson. Thereafter, counsel clarified that it was intended to be the joint response of the Congressman and the Committee.

1 person or *corporate entity*. The maximum contribution for an individual, *corporation*, PAC or  
2 trust is \$500 for the primary and \$500 for the general (\$1,000 for the entire cycle) [emphasis  
3 added].” *Id.* at 1. It also provided instructions on how to send contributions and identified a web  
4 page specifically dedicated to making contributions. The invitation included a disclaimer stating  
5 that it was a political advertisement paid for and approved by Scott Maddox, and that the  
6 purchase of a ticket for, or contribution to, the event would constitute a contribution to Maddox.  
7 *Id.* Following the invitation, there is an additional disclaimer on the e-mail reading, “Political  
8 Advertisement Paid for and Approved by Alan Grayson, Democrat, for U.S. Congress, Florida  
9 District 8.” Attachment 1. Complainant alleges that by emailing this invitation, Congressman  
10 Grayson and the Committee solicited prohibited contributions on behalf of a non-federal  
11 candidate, in violation of 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62.

12 While Respondents acknowledge that the invitation constituted a solicitation, they  
13 dispute any liability under the Act. Response at 7. Respondents assert that Congressman  
14 Grayson gave the host committee permission to use his name in connection with the March 25,  
15 2010 fundraising event subject to his final approval of the invitation, but that he never gave such  
16 final approval. Instead, when a Committee volunteer forwarded a draft of the invitation to  
17 Congressman Grayson on March 20, 2010, Congressman Grayson asked that the invitation be  
18 changed to reflect that he might not be able to attend if Congress was in session that day, and  
19 asked whether the invitation needed a disclaimer regarding his participation. According to  
20 Respondents, the next day, the volunteer asked the host committee to include a statement about  
21 the Congressman’s possible non-attendance, but failed to ask the host committee, the Committee  
22 professional staff, or its outside counsel Congressman Grayson’s question concerning the need  
23 for a disclaimer. When the host committee forwarded a revised invitation to the Committee on

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1 March 21, 2010, reflecting the additional language about Congressman Grayson's possible non-  
2 attendance, the volunteer forwarded it to the campaign's e-mail vendor and asked the vendor to  
3 distribute it to e-mail list subscribers in the area where the fundraiser was scheduled, without first  
4 obtaining Congressman Grayson's final approval of the invitation. Respondents state that  
5 Congressman Grayson did not see the revised invitation until a reporter sent him a copy of the  
6 complaint in this matter on March 24, 2010, the day before the event. Congressman Grayson,  
7 who did not attend the event because of a vote in Congress on March 25, 2010, apparently did  
8 not attempt to retract the invitation, and the message remained posted on his campaign website  
9 until being removed sometime after July 1, 2010.

10 Respondents assert that application of the law in effect at the time of the activity  
11 demonstrates that Congressman Grayson "may not be held responsible for any violation of  
12 2 U.S.C. § 441i(e)(1) that may have occurred in connection with the Maddox fundraising event."  
13 Response at 6. Further, Respondents maintain that "given the confused state of the law prior to  
14 the Commission's recent adoption of a new rule governing a Federal officeholder's participation  
15 in a non-federal fundraising event, any attempt to hold [Respondents] responsible for any  
16 violation of 2 U.S.C § 441i(e)(1) that may have occurred prior to the issuance of the new final  
17 rule," would raise constitutional concerns. *Id.* See also Participation by Federal Candidates and  
18 Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24375 (May 5, 2010) ("E&J").  
19 Respondents accordingly request that the Commission either find no reason to believe that such  
20 violation occurred or, alternatively, exercise its prosecutorial discretion and dismiss this matter.

21 **B. Legal Analysis**

22 Under the Federal Election Campaign Act of 1971, as amended ("the Act"), candidates or  
23 individuals holding federal office, or their agents (collectively, "covered persons") may not

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1 solicit funds in connection with a non-federal election unless the funds comply with the source  
2 restrictions for contributions in connection with a federal election. 2 U.S.C. § 441i(e)(1)(B).  
3 Accordingly, covered persons may not solicit corporate contributions in connection with a non-  
4 federal election. *See* 2 U.S.C. § 441b(a). Congressman Grayson and the Committee are  
5 "covered persons."

6 The Commission defines "solicitation" as an oral or written communication that,  
7 construed as reasonably understood in the context in which it is made, contains a clear message  
8 asking, requesting, or recommending that another person make a contribution, donation, transfer  
9 of funds, or otherwise provide anything of value. 11 C.F.R. § 300.2(m). Commission  
10 regulations provide specific examples of solicitations, including communications that provide  
11 instructions on how or where to send contributions or that identify a website specifically  
12 dedicated to facilitating the making of contributions. 11 C.F.R. § 300.2(m)(1)(ii)-(iii).

13 The Committee's March 21, 2010 e-mail communication constitutes a solicitation. In  
14 addition to suggesting a specific contribution amount per person or corporate entity, it informs  
15 recipients to make checks payable to the "Scott Maddox Campaign" and provides the website  
16 address [www.scottmaddox.com/contribute](http://www.scottmaddox.com/contribute) to contribute online. Additionally, because the  
17 Commission's vendor sent the e-mail from [alangrayson@graysonforcongress.com](mailto:alangrayson@graysonforcongress.com), and the email  
18 contains a disclaimer that the communication is a "[p]olitical advertisement Paid for and  
19 Approved by Alan Grayson, Democrat, for U.S. Congress," the communication appears, on its  
20 face, to be a solicitation for prohibited contributions by Congressman Grayson and his  
21 Committee. Respondents concede that the invitation "clearly did constitute a solicitation  
22 because it expressly requested corporate contributions prohibited by 2 U.S.C. § 441b(a)."  
23 Response at 7.

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1 Respondents argue, however, that under the guidance in effect at the time of the activity,  
2 they cannot be held responsible for any violation of 2 U.S.C. § 441i(e)(1) that may have  
3 occurred. Citing to Advisory Opinion 2003-3 (Cantor), where the request concerned pre-event  
4 publicity by a non-federal entity, Respondents maintain that the applicable analysis requires a  
5 determination that the federal officeholder approved, authorized, agreed or consented to be  
6 featured or named in the publicity. Respondents assert, however, that Congressman Grayson did  
7 not give final authorization to use his name in the solicitation, because his consent was  
8 contingent on receiving the answer to whether the invitation needed a disclaimer limiting the  
9 solicitation to federally-compliant funds. Response at 7.

10 To the extent that Respondents imply that a disclaimer limiting the solicitation to  
11 federally-compliant funds would have made the e-mail solicitation distributed by a covered  
12 federal candidate or committee permissible, they are incorrect. In Advisory Opinion 2003-36  
13 (Republican Governors Association), issued in response to questions concerning the use of  
14 federal candidates' and officeholders' names in publicity distributed by a non-federal entity, the  
15 Commission stated that "[a]lthough Advisory Opinion 2003-03 might be read to mean a  
16 disclaimer is required in publicity or other written solicitations that explicitly ask for donations  
17 'in amounts exceeding the Act's limitations and from sources prohibited from contributing under  
18 the Act,' that was not the Commission's meaning." Rather, "[t]he Commission wishes to make  
19 clear that the covered individual may not approve, authorize, agree, or consent to appear in  
20 publicity that would constitute a solicitation by the covered person of funds that are in excess of  
21 the limits or prohibitions of the Act, regardless of the appearance" of a disclaimer limiting the

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1 solicitation to federally-compliant funds. AO 2003-36 at 6, fn 9.<sup>2</sup> Thus, in contrast to the  
2 circumstances presented by Advisory Opinions 2003-03 and 2003-36, the pre-event publicity in  
3 this matter was disseminated by a covered person, indicating that even if Congressman Grayson  
4 had approved it with a disclaimer limiting the solicitation to federally-compliant funds,  
5 Respondents might have violated 2 U.S.C. § 441i(e).

6 Accordingly, the central issue is Respondents' assertion that Congressman Grayson never  
7 had the opportunity to receive guidance concerning a disclaimer or to approve the solicitation  
8 before it was distributed by e-mail. Response at 7. Cognizant that section 441i(e) applies to  
9 "agents" of federal officeholders, they also maintain that the campaign volunteer who gave the  
10 invitation to the e-mail vendor for distribution was not the Congressman's "agent." Response at  
11 8-9. Respondents contend that the volunteer acted in contravention of Congressman Grayson's  
12 instructions and therefore could not reasonably believe that the Congressman wanted the  
13 volunteer to authorize the use of his name on the invitation and the distribution of the invitation  
14 by e-mail. *Id.*

15 Commission regulations define "agent" as any person who has actual authority, either  
16 express or implied, to solicit, receive, direct, transfer, or spend funds in connection with any  
17 election on behalf of a federal candidate or officeholder. 11 C.F.R. § 300.2(b)(3). In its Revised  
18 Explanation and Justification for "Definitions of 'Agent' for BCRA Regulations on Non-Federal  
19 Funds or Soft Money and Coordinated and Independent Expenditures," 71 Fed. Reg. 4975.  
20 (January 31, 2006), the Commission pointed out that the definition applies to the solicitation of  
21 funds generally, and therefore campaign volunteers often fall within this definition. *Id.* at 4977.

<sup>2</sup> See also Advisory Opinion 2007-11 (California State Party Committees); Notice of Proposed Rulemaking, Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 74 Fed. Reg. 64016, 64018 (December 7, 2009) ("NPRM") (Federal candidates and officeholders may not solicit funds in excess of the amount limitations and source prohibitions of the Act and then qualify that impermissible solicitation with a limiting disclaimer.)

Moreover, the Commission indicated that if an act is within the agent's scope of actual authority, the principal could be liable for an activity undertaken by the agent despite contrary specific instructions by the principal. *Id* at 4978. It appears that, in this matter, the campaign volunteer had actual authority to discuss the invitation with the host committee and possibly to direct the Committee's vendor to distribute an e-mail communication. We do not know, however, whether determining the adequacy of a communication without the Congressman's explicit approval was within the volunteer's scope of actual authority.

Under other circumstances, we might have recommended an investigation to determine whether the scope of the volunteer's actual authority included approving the wording of the revised invitation and instructing the email vendor to distribute it, and to obtain the volunteer's account of his communications with Congressman Grayson and others.<sup>3</sup> We might also have explored whether the facts that Congressman Grayson saw the solicitation the day before the event, apparently did not attempt to retract it, and the solicitation stayed on the Committee's website for a long period of time after the event, constituted ratification of the solicitation by a covered person. However, given that the Commission has issued new rules effective June 4, 2010 governing this subject area, and has superseded pertinent parts of the previously cited Advisory Opinions in the accompanying E&J (at 24383), we do not think it would be an efficient use of the Commission's limited resources to investigate whether Congressman Grayson and/or the Committee violated the law then in effect by authorizing the e-mail solicitation through an agent or by ratification. Accordingly, we recommend the Commission exercise its prosecutorial discretion and dismiss the complaint's allegations that

<sup>3</sup> In MUR 6075 (Friends of Bill Zedler), the Commission found no reason to believe respondents violated 2 U.S.C. § 441i(e) where the covered persons' alleged "agent," state candidate Bill Zedler, submitted an affidavit averring that the federal candidates had not agreed to be featured in the pre-event publicity. See MUR 6075 Factual and Legal Analyses.

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Alan Grayson and the Committee to Elect Alan Grayson and Paul Ashcraft, in his official capacity as treasurer, violated 2 U.S.C. § 441i(e)(1). *See Heckler v. Chaney*, 470 U.S. 821 (1985).

**III. RECOMMENDATIONS**

1. Dismiss the allegation that Alan Grayson violated 2 U.S.C. § 441i(e).
2. Dismiss the allegation that the Committee to Elect Alan Grayson and Paul Ashcraft, in his official capacity as treasurer, violated 2 U.S.C. § 441i(e).
3. Approve the attached Factual and Legal Analysis.
4. Approve the appropriate letters.
5. Close the file.

P. Christopher Hughey  
Acting General Counsel

September 10, 2010  
Date

BY:

Susan L. Lebeaux  
Susan Lebeaux  
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*For a Fundraising Reception Benefiting  
Scott Maddox*

*-- Candidate for Florida Commissioner of Agriculture & Consumer Services*

**Thursday, March 25th**

**Dexter's in Hannibal Square  
558 W New England  
Winter Park, FL  
5:30 PM - 7:00PM**

**Suggested Contribution: \$500**

**Please make all checks payable to the "Scott Maddox Campaign".**

Contributions are limited to \$500 per person or corporate entity. The maximum contribution for an individual, corporation, PAC or trust is \$500 for the primary and \$500 for the general (\$1,000 for the entire cycle).

\*Congressman Grayson's attendance will depend on whether votes are scheduled that day in D.C.

If you are unable to attend the reception but would like to help Scott's fight against his opponent Congressman Adam Putnam and the Republican corruption, please go to  
<http://www.scottmaddox.com>.

**To contribute online, please go to: [www.scottmaddox.com/contribute/](http://www.scottmaddox.com/contribute/)**

**To RSVP, please contact the campaign at  
[jash@scottmaddox.com](mailto:jash@scottmaddox.com) or call (850) 222-6050**

Political advertisement paid for and approved by Scott Maddox, Democrat, for Florida Commissioner of Agriculture and Consumer Services. The purchase of a ticket for, or contribution to, the campaign fund-raiser is a contribution to the campaign of Scott Maddox. Contributions to the Scott Maddox Campaign are not deductible for Federal income tax purposes.

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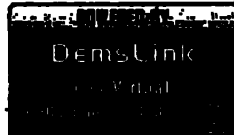
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